

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 009-0311

STATE OF MONTANA,

Plaintiff and Appellee,

v.

CARL MELVIN ANKENY,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Third Judicial District Court,
Anaconda-Deer Lodge County, The Honorable Ray J. Dayton, Presiding

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STATEMENT OF THE ISSUES

1. Did the State present sufficient evidence at trial to convict Ankeny of partner or family member assault committed against a woman he was dating?
2. Did the district court properly and within its discretion admit expert testimony that victims of domestic violence often recant their stories?
3. Has Ankeny shown on the record that his attorney provided ineffective assistance of counsel by withholding objections to certain evidence properly admitted at trial--the victim's inconsistent statements as related by a witness and in 9-1-1 tapes--and to the appropriate closing argument of the prosecutor about meeting the State's burden of proof?

STATEMENT OF THE CASE

Appellant Carl Melvin Ankeny (Ankeny) appeals from the jury verdict and judgment convicting him of felony partner or family member assault for choking Shannon Carter, a woman he was dating, when they were out on a date together. (Tr. at 269-71; D.C. Docs. 56, 63, 67; see Aff. and Info., D.C. Docs. 2, 4.) The district court sentenced Ankeny as a persistent felony offender (see D.C. Doc. 14) to 12 years at Montana State Prison, with 5 years suspended; allowed 57 days credit for time served; made parole eligibility contingent on addressing mental health, chemical dependency, and anger management issues; ordered payment of

\$610 in fines and fees; and imposed conditions on any supervised release. (D.C. Doc. 63; Sent. Tr. at 13-21.) Ankeny does not assign error to any part of his sentence on appeal.

STATEMENT OF THE FACTS

It is undisputed that Carter went out on a date with Ankeny. (Tr. at 69, 224.) They went for a ride, “kind of barhopped for a little while,” and had quite a few (18) beers. (Tr. at 70, 84, 97-98.) Ankeny testified that they made sure to stop and do “adult things too.” (Tr. at 225.) The two stayed out until early the next morning.

Sometime around four in the morning, Carter called her ex-boyfriend and partner of 7 years, Shane Nisbet. (Tr. at 114.) Carter was in hysterics, distraught, and crying, and Nisbet could hardly understand her at first. (Id.) Nisbet testified that Carter told him that she had jumped out of the car because Ankeny had tried to kill her. (Id. at 115.) Carter told Nisbet that Ankeny was driving up and down the road looking for her and she was hiding from him in the ditch. (Id.) Carter told Nisbet that Ankeny had tried to choke her. (Id. at 116.) Carter wanted Nisbet to come and get her. (Id. at 116-17.) Carter was afraid that Ankeny would find her. (Id. at 117.) She was also afraid the police would find her and take away her kids. (Id.)

Immediately following his conversation with Carter, Nisbet called 9-1-1. (Tr. at 117.) Nisbet testified that there was something in Carter's voice that worried him and made him believe that it was necessary to call the police. (Id. at 135.) The State, without objection from the defense, played the 9-1-1 tapes for the jury. (Id. at 135-38.) On recross examination of Nisbet, the defense twice replayed the 9-1-1 tape. (Id. at 141.) The 9-1-1 tapes were admitted as Exhibit A without objection by the defense. (Id. at 143.) On the 9-1-1 calls, Nisbet relayed the same basic information he testified to at trial: Carter was with Ankeny; Ankeny tried to kill her and "choke her out"; Carter jumped out of the car and was hiding in the ditch; and Carter was in tears, upset, in trouble, and scared to death--of Ankeny and the police. (State's Ex. A, D.C. Doc. 53; see also Tr. at 90.)

The police found Ankeny passed out or sleeping in the passenger seat of the car he and Carter had been driving while on their date. (Tr. at 148.) When the police found Carter, she was completely distraught and sobbing. (Id. at 150.) The officer spoke with Carter and explained that they had received a call that Ankeny had choked her and that she was hiding in the ditch because she was afraid of him. (Id. at 154.) According to her statements to police, Carter had told Ankeny that she wanted to go home and be with her kids, at which point Ankeny "freaked out and started choking her." (Id.) The officer observed signs of physical injury to Carter, specifically "red and scratch marks on the right side of her neck" and a

hickey. (Id. at 155-56.) The officer testified that those marks were consistent with having been choked. (Id. at 156-57.) Photographs of the marks were taken and admitted as State's Exhibits B, C, and D, without objection. (Id. at 157; D.C. Doc. 53.) Based on the 9-1-1 report, contact with Carter, and the observed injuries to Carter's neck, police arrested Ankeny. (Id. at 157-58.)

Carter testified that she had split up with Nisbet weeks before the assault. (Tr. at 77.) Carter testified that Ankeny was her "boyfriend." (Id. at 69, 80.) At the time of the assault, Carter and Ankeny had just started dating--that night was their "first date," she said. (Tr. at 69.)

The day after the assault and Ankeny's arrest, Carter wrote a statement in which she referred to Ankeny as her boyfriend and referred to the fact that they "had been dating." (Tr. at 80, 93-94; Def. Ex. B, D.C. Doc. 52.) Carter admitted that she and Ankeny had "been seeing one another for only approximately one month." (Def. Ex. B at 2, D.C. Doc. 52.) The defense introduced this letter into evidence. (Tr. at 94-95.) The defense elicited the admission from Carter that she had started dating Ankeny. (Id. at 87.)

Carter agreed with the defense characterization that "it was an interesting situation"--she had stopped dating Nisbet and started dating Ankeny. (Tr. at 87.) Carter admitted she had stayed in an abusive relationship with Nisbet for a long time, and was starting another abusive relationship with Ankeny. (Id. at 99.)

Carter did not leave Nisbet permanently until she “took up with” Ankeny. (Id. at 99.) On the night of the assault, Nisbet knew Carter was going out with Ankeny. (Id. at 112-13.) In the letter, Carter explained that she and Nisbet had been “broken up for a little over a month” and that Nisbet “hated the fact that [Ankeny] and I had been dating.” (Def. Ex. B at 2, D.C. Doc. 52.)

Ankeny had actually been a friend of Nisbet’s and had lived in Nisbet’s house from the middle of the summer in 2008, until late September or early October, when Nisbet asked him to leave. (Tr. at 86-87, 105-06.) Nisbet asked Ankeny to move out because he believed there was “something going on between him and her at that point.” (Id. at 106, 108.) One night Carter never came home and Nisbet found her together with Ankeny at another friend’s house. (Id. at 106-08.) On that occasion, Carter was still intoxicated when Nisbet found her and took her back home. (Id. at 108.) After that, Ankeny did not return to Nisbet’s home, but Carter and Ankeny continued to see each other. (Id. at 109.)

Ankeny testified at trial and admitted that he went on a “date” with Carter that night. (Tr. at 224.) Ankeny was excited because that was the first time they “were out together.” (Tr. at 224-25.)

Carter testified that she and Ankeny had gotten into an argument, but denied having told police that Ankeny had choked her. (Tr. at 75.) Carter testified she never told police that Ankeny had choked her and the reported assault never

happened. (Id. at 77, 81, 91.) Carter testified that she told Nisbet that Ankeny had taken her keys away from her and she needed a ride home. (Id.) Carter stated that Nisbet fabricated the story that Ankeny “had tried to kill her by choking her out.” (Id.) Nisbet testified that he did not make up any of his account of Carter’s telephone call and the statements she made to him. (Id. at 118.) What Nisbet told the 9-1-1 operator was what Carter told him on the phone. (Id. at 133, 134.) Carter did acknowledge that Ankeny “freaked out and took my car keys.” (Id. at 81) She agreed that they had argued, but maintained at trial that nothing physical had happened. (Id. at 84, 97.) Carter denied she had injuries on her neck, saying they were just hickies. (Id. at 92.)

The defense elicited testimony from Carter that her relationship with Nisbet had been violent in the past, there had been physical abuse, and she was scared of him. (Tr. at 88, 98-99.) Nisbet also testified they had been in an abusive relationship, and he had been the abuser, but he could not name all the incidents of abuse that occurred. (Id. at 110, 119.) There were more than three incidents, but they tended to “work it out.” (Id. at 110.) Carter testified that she stayed in that abusive relationship for a long time. (Id. at 99.) Despite that history, Nisbet was the first person she called when she needed help after her date with Ankeny. (Id. at 100.) She agreed she could have called her father or the police, but chose to call

Nisbet. (Id. at 101.) Carter agreed that there were now allegations of an abusive relationship starting with Ankeny. (Id. at 99.)

Social worker Joe Thompson was qualified without objection as an expert witness in the field of domestic violence. (Tr. at 206-09.) Thompson testified to his opinion that it was not unusual for victims of domestic violence to recant allegations of abuse. (Id. at 209.) Thompson also testified it was quite probable that a victim who had a history of domestic violence would recant when starting in a new relationship--particularly if she felt that this man was in some way different, that she was in love with him. (Id. at 210, 218.) In such a situation, it would be likely the victim would repeat the pattern. (Id. at 219.) Thompson agreed that where violence or abuse has happened two or more times, a victim could be considered a “battered woman.” (Id. at 217) Thompson offered no opinion or testimony relative to the facts or parties involved in this case.

Other facts in the record will be cited as necessary in the Argument section of this brief.

SUMMARY OF THE ARGUMENT

Ankeny’s three assignments of error are without merit. First, the evidence presented, in the light most favorable to the State, was more than sufficient for a rational trier of fact to conclude that Carter and Ankeny were “partners” as defined

in the statute (the only factual issue raised on appeal) and that Ankeny assaulted Carter (an element not challenged on appeal). There was ample evidence--much of it elicited or introduced by the defense--that Ankeny was, at the time of the assault, dating Carter and was considered to be her “boyfriend”--all of which supports the jury’s determination that Carter and Ankeny were “partners.” Even if the night of the assault was their first date, a fact which was not free from doubt at trial, Ankeny and Carter were at the time, under the plain language of the statute, “persons who have been or are currently in a dating or ongoing intimate relationship with a person of the opposite sex.” As the district court found, this issue was a jury question, which this Court should not disturb on appeal.

Second, the district court did not abuse its discretion when it admitted the expert testimony that victims of domestic violence and abuse--which Carter was shown to be--were likely to recant their allegations against their abusers--which Carter clearly did. The State presented sufficient foundation for such an opinion and Ankeny was entitled to attack its weight and credibility by cross-examination and refutation, in the same manner as any other expert opinion.

Finally, it is not evident on the record that Ankeny’s trial counsel provided ineffective assistance of counsel when he withheld objections to certain evidence and argument at trial. The failure to object to properly admitted evidence, or to appropriate argument in closing, does not constitute ineffective assistance of

counsel. Here, Carter’s prior inconsistent statements were not hearsay, which the district court and Ankeny’s counsel acknowledged on the record. The 9-1-1 tapes were used by Ankeny at trial for impeachment or other purposes, therefore, there was a tactical reason for not objecting shown on the record. The tapes were also properly admitted as prior consistent statements, or alternatively, their admission was harmless in light of the proper admission of Carter’s statements. Finally, the prosecutor’s remarks did not amount to a personal belief in Ankeny’s guilt, but were rather, in context, an explanation of the manner in which the State had satisfied its repeatedly emphasized burden of proof.

ARGUMENT

I. THERE WAS SUFFICIENT EVIDENCE PRESENTED AT TRIAL TO PROVE BEYOND A REASONABLE DOUBT THAT ANKENY COMMITTED PARTNER OR FAMILY MEMBER ASSAULT AGAINST THE WOMAN HE WAS ADMITTEDLY DATING.

A. Standard of Review

Whether sufficient evidence exists to convict is reviewed de novo to determine whether, in the light most favorable to the prosecution, any rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. State v. Trujillo, 2008 MT 101, ¶ 8, 342 Mont. 319, 180 P.3d 1153. De novo review does not conflict with the “traditional appellate deference to the trier of fact,” but applies only “to determine whether the facts, as established by

the evidence presented by the State, were sufficient to support the district court's conclusion that the charged offense was committed." Trujillo, ¶ 9.

The credibility of witnesses and the weight to be given to their testimony are determined by the trier of fact, and disputed questions of fact and credibility will not be disturbed on appeal. Trujillo, ¶ 8. It is the jury's role to weigh the evidence based on the credibility of the witnesses and determine which version of events should prevail. State v. Hayden, 2008 MT 274, ¶ 26, 345 Mont. 252, 190 P.3d 1091. "This Court remains evermindful of one fundamental rule--that questions of fact must be determined solely by the jury, and that given a certain legal minimum of evidence, this Court on review will not substitute its judgment for that of the jury." State v. Merseal, 167 Mont. 412, 415, 538 P.2d 1366, 1367 (1975).

B. Ample Evidence Was Presented that Ankeny and His Victim Were "Partners" as Defined by Statute Because it was Undisputed They Were in a "Dating or Ongoing Intimate Relationship."

As alleged in this proceeding (D.C. Docs. 2, 4), a person commits the offense of partner or family member assault if the person "purposely or knowingly causes bodily injury to a partner or family member." Mont. Code Ann. § 45-5-206(1)(a). A "partner," as defined by the statute, is a spouse, former spouse, person with a child in common, and, as specifically applicable here, a person who has been or is "currently in a dating or ongoing intimate relationship with a person of the opposite sex." Mont. Code Ann. § 45-5-206(2)(b). The district court

instructed the jury in a manner consistent with these statutory provisions, and the defense stipulated to those instructions. (Instrs. 12-16, D.C. Doc. 54; Tr. at 231, 235-36, 240-42.) Earlier in the trial, the district court had found, based on the evidence presented, that the issue was a jury question. (Tr. at 201-02.)

On appeal, Ankeny does not assert that there was insufficient evidence that he caused bodily injury to Shannon Carter or that he did so purposely or knowingly. Ankeny claims on appeal only that Carter was not proved to be a “partner” based on the evidence presented--and based on Ankeny’s interpretation of case law from other states. However, the facts established by the evidence presented by the State, were sufficient to support the conclusion that Ankeny and Carter were “currently in a dating or ongoing intimate relationship.” Mont. Code Ann. § 45-5-206(2)(b).

Under the facts and circumstances of this case, see supra at 2, 4-5, and in the light most favorable to the State, any rational trier of fact could have found beyond a reasonable doubt that Ankeny and Carter were “partners”--an essential element of the offense, and the only one at issue in this appeal. Contrary to Ankeny’s argument on appeal, and despite the evidence that this may have been the first time they “were out together,” the evidence in this case was undisputed that Carter had been broken up with Nisbet for up to a month; she had “taken up” with Ankeny; Ankeny was Carter’s boyfriend; Ankeny and Carter had been “seeing each other”

for a month and had been “dating;” there was something going on between them; and they continued to see each other.

“The Legislature need not define every term it employs when constructing a statute. If a term is one of common usage and is readily understood, it is presumed that a reasonable person of average intelligence can comprehend it.” State v. Trull, 2006 MT 119, ¶ 33, 332 Mont. 233, 136 P.3d 551. The plain language of the PFMA statute requires only that a partner be “currently in a dating or ongoing intimate relationship”--all terms of common usage capable of ready understanding, and which are not obscure or incomprehensible. See Trull, ¶ 34. Furthermore, considering the circumstances of the case, the evidence presented here undoubtedly shows Ankeny and Carter were, at the time, in a dating or ongoing intimate relationship. Trull, ¶ 35. This Court should not disturb the jury’s determination to that effect.

On appeal, Ankeny relies on numerous cases from other jurisdictions interpreting other states’ laws, factors, and standards for the proposition that a “first date” is insufficient to constitute a “dating relationship” for the purpose of other states’ domestic violence statutes. (Br. of Appellant at 15-20.) This Court need not resort to such interpretations where the intention of the Legislature may be so clearly determined from the plain meaning of the words used in the statute

here. Trull, ¶ 32 (interpretation of statute was clear based on plain meaning of the terms “protracted” and “impairment”).

The evidence of Carter’s current dating or ongoing intimate relationship with Ankeny was not limited to Carter’s jilted ex-boyfriend, but came directly from Carter and Ankeny. The fact that the defense elicited the admission from Carter that she had stopped dating Nisbet and started dating Ankeny is entirely contrary to, and inconsistent with, the arguments Ankeny now makes on appeal. Even in closing, the defense emphasized, rather than contested, the fact that Ankeny and Carter were partners--recognizing their “new relationship” and that they were “out that night.” (Tr. at 257-58.) Consistent with the legally sufficient evidence presented at trial, Ankeny never questioned--before this appeal--that he and Carter were “partners” for the purposes of this crime.

II. THE DISTRICT COURT PROPERLY AND WITHIN ITS DISCRETION ALLOWED EXPERT TESTIMONY TO THE EFFECT THAT VICTIMS OF DOMESTIC VIOLENCE OFTEN RECENT THEIR ALLEGATIONS OF ABUSE.

A. Standard of Review

This Court reviews a district court’s evidentiary rulings for abuse of discretion. State v. Price, 2007 MT 269, ¶ 10, 339 Mont. 399, 171 P.3d 293 (citing State v. Ayers, 2003 MT 114, ¶ 24, 315 Mont. 395, 68 P.3d 768). The test for abuse of discretion is whether the district court acted arbitrarily without

conscientious judgment or exceeded the bounds of reason. Price, ¶ 10, (citing Ayers, ¶ 26).

B. The District Court Did Not Abuse Its Discretion When It Admitted the Relevant Expert Testimony and Allowed Ankeny to Attack Its Weight by Cross-Examination and Refutation.

Expert testimony is governed by Mont. R. Evid. 702, which provides: “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.” The test for admissibility of expert testimony is whether “the matter is sufficiently beyond common experience that the opinion of the expert will assist the trier of fact to understand the evidence or to determine a fact in issue.” Price, ¶ 23, (citing Ayers, ¶ 36). Where the Daubert “novel scientific evidence” standard is inapplicable, as in this case, it is better to admit relevant scientific evidence in the same manner as other expert testimony and allow its weight to be attacked by cross-examination and refutation.” Price, ¶ 23, (citing Barmeyer v. Montana Power Co., 202 Mont. 185, 193-94, 657 P.2d 594, 598 (1983), overruled on other grounds, Martel v. Montana Power Co., 231 Mont. 96, 103, 752 P.2d 140, 145 (1988)).

In cases involving a recantation, this Court has explained that expert testimony may help the jury to understand the inconsistencies in the victim’s

testimony. State v. Bonamarte, 2009 MT 243, ¶ 24, 351 Mont. 419, 213 P.3d 457 (citing State v. Stringer, 271 Mont. 367, 377, 897 P.2d 1063, 1069 (1995)). Such testimony would provide information “to aid the jury in evaluating the evidence. This type of limited testimony does not invade the jury’s role in determining the credibility of witnesses.” Bonamarte, ¶ 24 (quoting Stringer, 271 Mont. at 377).

Such evidence may not be offered to bolster a witness’s testimony, comment as to the credibility of a witness, or offer an opinion on whether the witness is a battered spouse, but to provide the jury with an explanation for the inconsistencies in her testimony. Stringer, 271 Mont. at 377. Thus, expert testimony on battered woman syndrome should generally be admissible, provided an appropriate foundation is laid, but this Court declined to set hard and fast foundational requirements, preferring instead, to leave those to the sound discretion of the trial court on a case by case basis. Stringer, 271 Mont. at 377; see also People v. Seeley, 720 N.Y.S.2d 315 (N.Y. Sup. Ct. 2000) (expert prohibited from offering an opinion that the victim is a battered person, but permitted general testimony about battered woman’s syndrome to explain a recantation or an inconsistent statement or unusual behavior); State v. Haines, 860 N.E.2d 91 (Ohio 2006) (citing Stringer for proposition that rigid foundational requirement is unnecessary).

In this case, the State presented foundational evidence that Carter had been in a long term abusive relationship with her domestic partner Nisbet, that there had

been multiple incidents of abuse, and that Nisbet had often been the abuser. In addition, despite such history of domestic violence, Carter had continued to return to the abusive relationship and had even commenced another abusive relationship with Ankeny. The district court made unequivocal findings of fact that the proper foundation had been laid. (Tr. at 201, 203, 205.)

Significantly, the defense conceded at trial that the foundational requirements for Thompson's expert opinion had been met. (Tr. at 202, 203.) Therefore, Ankeny's argument on appeal that the foundation was improper (Br. of Appellant at 22-24), was waived by Ankeny's acquiescence and failure to object, and should be rejected by this Court. See State v. West, 2008 MT 338, ¶ 16, 346 Mont. 244, 194 P.3d 683; State v. Malloy, 2004 MT 377, ¶ 11, 325 Mont. 86, 103 P.3d 1064; Mont. Code Ann. § 1-3-207; Mont. Code Ann. § 46-20-104(2).

Thompson was qualified without objection as an expert witness in the field of domestic violence and testified to his opinion that it was not unusual for victims of domestic violence to recant allegations of abuse. (Tr. at 206-09.) The defense took advantage of its opportunity to cross examine and challenge Thompson's opinion. (Tr. at 210-17, 219-21.)

Thompson offered no opinion or testimony relative to the facts or parties involved in this case. The opinion was not offered to bolster Carter's testimony, comment as to her credibility, or establish that Carter was a battered woman, but to

provide the jury with an explanation for the inconsistencies in her testimony--an explanation the jury could either accept or reject. (See Instr. 21, D.C. Doc. 54.) As the district court found before allowing Thompson's testimony: "We're not going to talk about credibility. He's not going . . . to be allowed to say 'the witness was lying or telling the truth.' That's for the jury to decide." (Tr. at 204.) The district court allowed this expert testimony for the appropriate purpose to explain that "people subjected to domestic violence often recant. It's not as complicated as we want to make it." (Id. at 205.)

It was not an abuse of discretion for the district court to allow this expert testimony given its proper purpose to aid the jury, and for the reason that Ankeny conceded both foundation and qualifications for the expert and had ample opportunity to challenge the opinion by cross-examination and refutation.

III. ANKENY'S COUNSEL DID NOT PROVIDE INEFFECTIVE ASSISTANCE BY WITHHOLDING OBJECTIONS TO PROPERLY ADMITTED EVIDENCE AND APPROPRIATE ARGUMENT.

A. Standard of Review

Claims for ineffective assistance of counsel present mixed questions of law and fact, which this Court reviews de novo. State v. Maynard, 2010 MT 115, ¶ 11, ___ Mont. ___, ___ P.3d ___.

B. Counsel’s Failure to Object to Properly Admitted Evidence and Appropriate Closing Argument Did Not Amount to Deficient Performance.

This Court has adopted the two-prong ineffective assistance of counsel test as established by Strickland v. Washington, 466 U.S. 668, 687 (1984). Maynard, ¶ 14 (citing Whitlow v. State, 2008 MT 140, ¶ 10, 343 Mont. 90, 183 P.3d 861). Under the first prong, the defendant must demonstrate “that counsel’s performance was deficient.” Strickland, 466 U.S. at 687. A deficiency of performance arises when counsel’s actions fall “below an objective standard of reasonableness,” thereby denying a defendant his right to counsel as guaranteed by the Sixth Amendment. Strickland, 466 U.S. at 687-88. Under the second prong, “the defendant must show that the [counsel’s] deficient performance prejudiced the defense.” Strickland, 466 U.S. at 687. The defendant must demonstrate “prejudice” by “show[ing] that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Strickland, 466 U.S. at 694. “[I]f an insufficient showing is made regarding one prong of the test, there is no need to address the other prong.” Whitlow, ¶ 11.

On direct appeal, this Court will generally only address a claim of ineffective assistance of counsel if the claim is “record-based.” State v. Herman, 2008 MT 187, ¶ 15, 343 Mont. 494, 188 P.3d 978. A claim is record-based if “the

record fully explain[s] why counsel took the particular course of action.” Herman,
¶ 15 (citing State v. White, 2001 MT 149, ¶ 20, 306 Mont. 58, 30 P.3d 340).

Occasionally, this Court may address on direct appeal a claim that is not
record-based if there is “no plausible justification” for counsel’s conduct. Herman,
¶ 16 (citing State v. Jefferson, 2003 MT 90, ¶ 50, 315 Mont. 146, 69 P.3d 641).

The situations when no justification will exist for counsel’s actions are relatively
rare. Herman, ¶ 16.

Furthermore, this Court has held that the failure to object to properly
admitted evidence does not constitute ineffective assistance of counsel. State v.
Parker, 2007 MT 243, ¶ 21, 339 Mont. 211, 169 P.3d 380; see also Kills On Top v.
State, 273 Mont. 32, 51, 901 P.2d 1368, 1380 (1995) (failure to object does not
constitute ineffective assistance of counsel when the objection lacks merit and
would have been properly overruled). Furthermore, this Court will not second
guess the trial tactics of defense counsel. State v. Hurlbert, 232 Mont. 115, 120,
756 P.2d 1110, 1113 (1988) (citing State v. Tome, 228 Mont. 398, 402, 742 P.2d
479, 482 (1987); State v. Brown, 228 Mont. 209, 212, 741 P.2d 428, 430 (1987))
Counsel’s use of objections lies within his or her discretion. Clausell v. State,
2005 MT 33, ¶ 20, 326 Mont. 63, 106 P.3d 1175. It is not unreasonable that
counsel, as a trial tactic, would refrain from objecting at certain times in a
proceeding, and any number of reasons not apparent on the record may explain

why an attorney chooses not to lodge an objection. State v. Olsen, 2004 MT 158, ¶ 17, 322 Mont. 1, 92 P.3d 1204. Hence, the failure to object, or the conscious, tactical decision not to, is within the “wide range” of permissible professional legal conduct. Dawson v. State, 2000 MT 219, ¶ 105, 301 Mont. 135, 10 P.3d 49.

1. Carter’s Prior Inconsistent Statements and the 9-1-1 Tapes Were Properly Admitted.

a. Carter’s Prior Inconsistent Statements

Ankeny argues on appeal that his counsel should have objected on hearsay grounds to admission of Carter’s prior inconsistent statements--that Ankeny had tried to kill her by choking her out. (See Br. of Appellant at 28 (referencing Tr. at 61, 115-17).) There is a record-based explanation for why counsel did not object to this evidence, but it establishes proficient, not deficient, legal performance: counsel and district court agreed on the record that it was not hearsay.

THE COURT: You’re saying that you can put [Carter] on the stand and she can say he didn’t do it, nothing happened. And [the State] can’t cross examine her with the statement that where she earlier said he did?

MR. SNEDIGAR: No, I’m saying that there’s a possibility that would fall under hearsay exception . . .

THE COURT: Oh, okay.

MR. SNEDIGAR: . . . for inconsistent statement. But whether or not that would happen would have to be played out . . .

THE COURT: But by definition it wouldn’t be hearsay? It’s a statement which is not hearsay if she’s there testifying subject to

cross examination, it's a prior statement, it's not hearsay, it's not an exception.

MR. SNEDIGAR: That would be correct, Your Honor. There is also some exceptions that they might fall under.

(2/20/09 Tr. at 4-5; see also 2/20/09 Tr. at 14-19.)

The district court's and counsel's understanding, and apparent concession, regarding admission of this evidence was legally correct. Pursuant to Mont. R. Evid. 801(d)(1)(A), a prior oral or written statement inconsistent with the testimony of a trial witness is admissible. State v. Herman, 2009 MT 101, ¶ 37, 350 Mont. 109, 204 P.3d 1254. Furthermore, being properly admitted evidence, counsel's failure to object cannot, objectively, rise to ineffective assistance. The record is clear, therefore, that admission of this evidence without objection by counsel was not deficient performance. Strickland, 466 U.S. at 687-88.

b. 9-1-1 Tapes

There likewise appears to be a record-based explanation for why counsel did not object to admission of the 9-1-1 tapes, though it is less clear. After the tapes were first played for the jury and admitted into evidence without objection (Tr. at 135-38, 143), the defense twice replayed the 9-1-1 tape on recross examination of Nisbet and questioned him about it. (Id. at 141.) While the exact purpose of replaying the tapes multiple times is not clear--perhaps to impeach Nisbet about confusion or mistakes contained in his statements, or to advance the theory that

Nisbet fabricated his story (Id. at 140-42)--there can be no doubt that counsel had a reason to acquiesce in their admission and use them in a manner that put them before the jury again, and again. This is exactly the kind of trial tactic that this Court should not second guess.

Furthermore, while the 9-1-1 tapes may have contained “double hearsay,” both components were admissible. Hearsay within hearsay is not excluded under the hearsay rule “if each part of a combined statement conforms with an exception to the hearsay rule provided in these rules.” Mont. R. Evid. 805; see State v. Graves, 272 Mont. 451, 901 P.2d 549 (1995) (overruled on other grounds State v. Herman, 2008 MT 187, 343 Mont. 494, 188 P.3d 978). The underlying declarations that Carter told to Nisbet were admissible, as explained above as prior inconsistent statements of Carter. Mont. R. Evid. 801(d)(1)(A). The recorded declarations of Nisbet would be admissible as prior consistent statements offered to rebut an express or implied charge against the declarant of subsequent fabrication, which was manifest on the record throughout trial. Mont. R. Evid. 801(d)(1)(B); State v. Mensing, 1999 MT 303, ¶ 15, 297 Mont. 172, 991 P.2d 950. (See Tr. at 77, 116, 118, 120, 122, 125-31, 132-33, 140-41.) In the alternative, even if there were a legitimate issue about the charge of fabrication (which has never been raised by Ankeny), any such error from admission of the tapes would have been harmless because Carter’s statements were previously properly admitted. See

Graves, 272 Mont. at 460 (concluding district court’s admission of police dispatcher’s testimony about 9-1-1 call was harmless error in light of other evidence that was properly admitted).

Therefore, no theory of ineffective assistance is supported by the record. Counsel’s failure to object to the 9-1-1 tapes was either a competent tactical decision to use the tapes for impeachment of Nisbet, the tapes were properly admitted under Mont. R. Evid. 805, or there was no prejudice to Ankeny from admission of the tapes.

2. The State’s Closing Argument Was Appropriate.

Closing arguments that reflect the prosecutor’s personal opinions as to guilt are improper. State v. Stewart, 2000 MT 379, ¶ 42, 303 Mont. 507, 16 P.3d 391 (citing State v. Gladue, 1999 MT 1, ¶ 21, 293 Mont. 1, 972 P.2d 827). This Court will consider an alleged improper statement during closing argument in the context of the entire closing argument. State v. Roubideaux, 2005 MT 324, ¶ 15, 329 Mont. 521, 125 P.3d 1114.

When the statements Ankeny complains about are taken in context of the entire closing argument, it is clear that the prosecutor did not state a personal opinion or belief in Ankeny’s “guilt.” Rather, her “belief” was that the State had met its burden to prove the elements of the crime beyond a reasonable doubt--a

burden the prosecutor consistently reaffirmed. The prosecutor's beliefs were in regard to the evidence presented and that the State had met its burden.

The prosecutor clearly stated its burden and said, "The State believes it has shown, through the evidence presented to you that, beyond a reasonable doubt, the elements of the crime of partner or family member assault." (Tr. at 244.) Again, the prosecutor told the jury that the State "believes it has met its burden of proof to show beyond a reasonable doubt" that Carter and Ankeny were partners. (Id. at 246.) On the same page, the prosecutor did not say that she "believed" Ankeny was guilty, but explained what the State had alleged: "Now remember why we're here, again, we're here because the State believes and has alleged that [Ankeny] choked [Carter][.]" (Id.) The prosecutor also said, "I have proven, I believe, beyond a reasonable doubt that choking and the red marks caused physical pain." (Id. at 247.) Similarly, "In this case, where the proof is, the State believes beyond a reasonable doubt that [Ankeny] assaulted [Carter] by choking her." (Id. at 253.) Finally, "All of the elements of partner or family member assault, the State believes it has proved to you beyond a reasonable doubt and ask that you return a verdict of guilty." (Id. at 256.)

These statements cannot be taken out of the context of the entire closing which emphasized again and again the State's burden of proof regarding those allegations and the evidence that had been presented. They are not improper

simply because the prosecutor stated her “belief” as to how the evidence presented went to meet the State’s repeated burden of proof. As in Roubideaux, where the prosecutor clearly stated to the jury that they needed to decide if he had “proved the elements of the case beyond a reasonable doubt,” these statements did not shift the burden of proof and deny a fair trial. Roubideaux, ¶ 15. A prosecutor’s remarks that the evidence supported every charge was simply a comment on the evidence in the case and what that evidence established, and such comments on the evidence are proper. Gladue, ¶ 21. The prosecutor’s remarks in this case do not imply any knowledge, or belief in Ankeny’s guilt, separate from the evidence at trial: “Look at the evidence, look at what we’ve shown.” State v. Campbell, 241 Mont. 323, 329, 787 P.2d 329 (1990). This is not a case where the prosecutor made impermissible comments about witness credibility and allegations that a witness lied, thus Ankeny’s reliance on State v. Lindberg, 2008 MT 389, 347 Mont. 76, 196 P.3d 1252, is misplaced.

As these remarks were appropriate within the confines and context of the State’s closing argument, counsel’s decision not to object cannot be said to deficient performance. Further, even if they were objectionable, there is no explanation on the record--nor even argument on appeal--why counsel did not object, and Ankeny has not shown there was “no plausible justification” for counsel’s conduct.

CONCLUSION

This Court should affirm the jury verdict and judgment convicting Ankeny of the partner or family member assault of Shannon Carter, whom he was dating at the time.

Respectfully submitted this 16th day of June, 2010.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 6,183 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

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